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In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, LANETT STANLEY, BILLY MCKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHALE ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY-YOUNG CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY JOHNSON, REV. G. L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH ENGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

v.

STATE OF GEORGIA,

Appellee.

On Appeal From The United States District Court For The District of Columbia (Three Judge Court)

REPLY BRIEF

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ARGUMENT

I. Denial of Intervention Was Error

A. Representation Is not Adequate.

The state argues that intervention was properly denied because the United States adequately represented the interests of appellants at trial. Motion to Affirm, p. 19. Assuming that to be true, it is also irrelevant. The issue presented in this appeal is whether the district court properly denied appellants' motion to intervene for purposes of pursuing an appeal. Given the fact that the United States dismissed its appeal it cannot in logic or law be said that the United States is adequately representing appellants' interests at the present time.

B. Effective Enforcement of Section 5 Depends on Participation by Private Parties.

The state is also in error in arguing that private parties have no appropriate role in Section 5 enforcement. The availability of a private cause of action to enforce the Voting Rights Act, as well as the practical need for private enforcement, are well established.

In *Allen v. State Board of Elections*, 393 U.S. 544, 555 (1969), the Court expressly held that a private cause of action exists to enforce Section 5. In doing so, the Court noted that vesting sole enforcement authority in the Attorney General would perpetuate the problem of inadequate enforcement the Act was designed to ameliorate: "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* at 556. The guarantees of Section 5 "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557.

Congress has amended the Voting Rights Act post-*Allen* and has expressly endorsed private enforcement. *See* H.R. Rep. No. 397, 91st Cong., 2d Sess. 8 (1970) (endorsing *Allen* and approving "the need for private policing"); S. Rep. No. 295, 94th Cong., 1st Sess. 39-41 (1975) ("Congress depends heavily upon private citizens to enforce the fundamental rights involved"); S. Rep. No. 417, 97th Cong., 2d Sess., pt. 1, 30 (1982) ("reiterat[ing] the existence of the private right of action . . . as has been clearly intended by Congress since 1965").

Private enforcement has proved indispensable to the effective implementation of the Act. From July 1, 1976 to September 30, 1993 a total of 3,656 voting cases were filed in federal district court. Annual Reports of the Director of the Administrative Office of the United States Courts, 1977-1993, Table C-2. Of these, the United States was a plaintiff in only 174 (4.8%). *See* Chandler Davidson & Bernard Grofman, "The Voting Rights Act and the Second Reconstruction," in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* 385 (Davidson & Grofman eds., 1994) (one of the most notable features of the Act "is its encouragement of the private bar to take a major role in enforcing public voting rights law"). The state's reliance on *Morris v. Gresette*, 432 U.S. 491 (1977), is misplaced. *Morris* did not address the issue of private enforcement of the Act at all. It held only that the decision of the Attorney General in preclearing a voting change cannot be judicially reviewed. *Id.* at 507. That is not an issue in this appeal.

C. Failure to Appeal by the United States Does not Foreclose Appeal by a Private Party.

The state argues incorrectly that the decision of the United States not to pursue its appeal is tantamount to granting Section 5 preclearance and precludes appeal by a private party. First, the Attorney General has objected to the proposed changes, and that objection has not been withdrawn.

Second, appellants are not appealing the decision of the United States not to appeal, but the decision of the three judge court denying intervention and granting preclearance. Such an appeal is authorized by the Voting Rights Act. *See* 42 U.S.C. § 1973c.

The decision in *NAACP v. New York*, 413 U.S. 345 (1973), is dispositive of the question of the jurisdiction of the Court over this appeal. In *NAACP* the three judge court, with the consent of the United States, entered judgment for the state of New York in a bailout action under Section 4(a) of the Voting Rights Act. In the same order, the court denied the motion of the NAACP for leave to intervene. The Supreme Court held that it "had jurisdiction, on direct appeal . . . to determine whether the District Court erred in denying the motion to intervene." 413 U.S. at 356. There is no basis for treating differently an unsuccessful intervenor under the parallel provisions of Section 5 of the Act.

Third, the decision of the United States not to appeal a determination under Section 5 is simply that – a decision not to appeal. But that decision, as *NAACP v. New York* makes clear even where the United States actually consented to judgment, is not dispositive of the question whether the rulings of the district court were right or wrong. Those questions can only be answered by this Court. *See Blanding v. DuBose*, 454 U.S. 393, 401 (1982), and *County Council of Sumter County South Carolina v. United States*, 555 F.Supp. 694, 696 (D.D.C. 1983) (granting relief to private appellants in a Section 5 enforcement action despite the failure of the United States to appeal the adverse decision of a three judge court).

D. Section 2 Is no Bar to an Appeal.

The state argues that the lower court should be affirmed because appellants can pursue a challenge to the disputed voting practices under Section 2 of the Voting Rights Act. But that would exactly reverse the procedure for enforcing voting rights established by Congress.

Congress concluded in 1965 that the case-by-case litigation method of enforcing voting rights embodied in the Civil Rights Acts of 1957, 1960, and 1964 had not remedied the problem in a timely or effective manner. *See South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) ("these new laws have done little to cure the problem of voting discrimination"). Accordingly, in enacting Section 5 Congress adopted a new approach that would provide "an expeditious and effective review" of proposed changes in voting. S. Rep. No. 97-417, *supra*, at 6.

Section 5, which creates "in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect," *McCain v. Lybrand*, 465 U.S. 236, 256 (1984), was designed "to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." *South Carolina v. Katzenbach, supra*, 383 U.S. at 328, 335. The burden shifting of Section 5 has been consistently sustained by the Court for the reasons articulated in *Katzenbach*. *See City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980); *Georgia v. United States*, 411 U.S. 526, 538 n.9 (1973) ("[r]ather than requiring affected parties to bring suit to challenge every changed voting practice, States subject to § 5 were required to obtain prior clearance before proposed changes could be put into effect").

Taking the state's argument to its logical conclusion, minority plaintiffs would never be able to seek enforcement of Section 5 because they could always bring a Section 2 action. Such a ruling would radically alter Section 5. Indeed, a three judge court rejected a similar claim by the state in an earlier related phase of this case. *See Brooks v. State Board of Elections*, Civ. No. CV 288-146 (S.D.Ga. June 27, 1989), slip. op. at 1 ("[i]t is appropriate to decide such section 5 issues before the district court considers the section 2 claims").

E. The Notice of Appeal Was Timely.

Appellants filed their motion to intervene and notice of appeal within the time for filing a notice of appeal by the United States. For that reason the notice of appeal was timely. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977) (motion by a non-party to intervene for the purpose of appealing is timely if filed "within the time period" in which a named party could appeal).

The cases relied upon by the state are inapposite. In *Moten v. Bricklayers, Masons and Plasterers*, 543 F.2d 224, 227 (D.C.Cir. 1976), appellants never even sought to intervene as parties. In *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990), the court held, not surprisingly, that a motion to intervene filed some 20 years after the litigation had begun and after four years of "complex and delicately balanced" negotiations was untimely. Here, both the motion to intervene and the notice of appeal were timely.[1]

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[1] It is not necessary to vacate and remand for further consideration in light of the United States withdrawal of its appeal as the Solicitor General has suggested. Motion to Vacate and Dismiss, p. 10. Should this Court determine that intervention was improperly denied, a determination which it has jurisdiction to make, NAACP v. New York, *supra*, 413 U.S. at 356, appellants should be treated as parties for purposes of appealing the decision of the three judge court. Intervenors who "properly become parties, may appeal an adverse judgment." Marino v. Ortiz, 484 U.S. 301, 304 (1988). *See* Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471, 1480 n.3 (11th Cir. 1993) ("[b]ecause we conclude that the district court improperly denied intervention, the intervenors are now parties for purposes of appealing the district court's findings and the injunction").

II. The Evidence of Racial Purpose Is Essentially Unrefuted

The state does not deny that the district court failed to consider any of the evidence of racial purpose in the adoption of the majority vote requirement used in the election of superior court judges. Nor does the state attempt directly to refute that evidence. Instead, it chooses essentially to ignore it.

In the most general and conclusory manner, the state says that the purpose behind adoption of the majority vote law "is radically different than what Appellants present in their Jurisdictional Statement." Motion to Affirm, p. 17. But the state does not deny the evidence showing that a majority vote bill was first introduced in the general assembly by Rep. Denmark Groover, that his stated purpose was to dilute "Negro bloc voting," that the Groover bill was adopted overwhelmingly by the house, that Groover subsequently made racial appeals in support of the bill before the senate rules committee, that the Election Law Study Committee proposed adoption of a majority vote requirement along with other measures that were admittedly intended to dilute minority voting strength (*e.g.*, a literacy test for voting), and that the general assembly enacted a discriminatory literacy test at the same time it adopted the majority vote requirement. Nor does the state undermine the testimony of Senator Leroy Johnson and Representative James Mackay that the general assembly passed the majority vote bill for the express purpose of diluting the voting strength of black voters.

The state argues that the majority vote requirement was part of a good government reform effort of the administration of Governor Carl Sanders to revise the state's election code. This argument overlooks the fact that the 1964 law was passed by the general assembly, and not a separate entity known as "the Sanders administration."

In addition, Governor Sanders, while a moderate given prevailing racial views, was still a Georgia politician. He could never have been elected to statewide office had he been as "liberal" on issues of race, or simply unconcerned about them, as the state claims. In his first term in the Georgia house in 1955, Sanders voted for a number of overtly racial measures, *e.g.*, a bill authorizing the governor to close the public schools to avoid integration, a resolution condemning the *Brown* decision as "null, void, and of no effect," a bill sponsored by Groover requiring segregation in common carriers, a bill authorizing the state police to enforce segregation laws, and a bill allowing public parks to be sold to private parties rather than be integrated. Georgia House Journal (1956), 365-566, 782-93, 656, 1366-67.

When he became president *pro tem* of the senate in 1959, Sanders sponsored bills to allow the governor to close public schools and universities, and to rewrite the admissions policies of the University of Georgia. Georgia Senate Journal (1959), 65-7. He sponsored other anti-integration bills in 1960. Ga. Laws 1960, 1135-37. In 1961 he sponsored a bill to provide tuition grants to students who attended private schools and voted to repeal compulsory education laws. DT, Kousser at 60. When he ran for governor in 1962, Sanders acknowledged in his platform that:

> My record in support of legislation over the years to maintain segregation is long, continuing, and well-known. It is not one of empty oratory, but concrete results . . . . As your governor, every legal means and every lawful recourse available will be utilized to the fullest to strengthen and to maintain Georgia's traditional separation, sponsored by the responsible leadership of the state, and passed almost unanimously by the General Assembly.

DT, Kousser at 61.

As governor-elect, Sanders also led an unsuccessful effort in the general assembly to require at-large elections for senate seats in Fulton county where a single member format, required by the state constitution, would allow for the election of a black to the all-white senate. In 1964, when Congress was considering passage of a public accommodations law, Sanders testified against the bill on the grounds that it would violate private property and state's rights. DT, Kousser at 63-7.

The argument that the majority vote requirement was not adopted with a racially discriminatory purpose because it was part of a revision of the code favored by the Sanders administration is inadequate to overcome the direct evidence of racial purpose in this case. It was error for the district court to refuse to consider that evidence.[2]

A. Retrogression Is not the Issue.

In an effort to dodge the evidence of racial purpose, the state argues that the method of electing judges is free of "discrimination" because it has no retrogressive effect.[3]

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[2] Following the state's request for reconsideration, the Attorney General precleared Georgia's new law abolishing the majority vote requirement and establishing a 45% plurality requirement for most general elections on September 11, 1995. Letter to Michael J. Bowers, Attorney General of Georgia, from Loretta King, Acting Assistant Attorney General, Sept. 11, 1995. Although the act of the legislature in 1994 doesn't shed light on the racial purpose of the legislature in 1964, it undercuts the post-hoc argument that the state "could not reasonably have done otherwise" than adopt a majority vote requirement. Motion to Affirm, p. 18. But for its desire to dilute minority voting strength, it could have adopted a plurality vote requirement.

[3] As appellants noted, there was evidence of adverse racial effect, *e.g.*, the impact of the majority vote requirement on the outcome of elections and in discouraging blacks from running for office. J.S. 10, 14.

The argument of no racial effect is based in turn on the proportionately fewer black lawyers in the state, which the state contends is "the crux of this case." Motion to Affirm, p. 6.

The state's argument fails for several reasons. Section 5 contains a purpose as well as an effect standard for determining "discrimination." The mere fact that a voting practice may not be retrogressive is not dispositive. As the Court indicated in *Johnson v. De Grandy*, 114 S.Ct. 2647, 2661 (1994), citing *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975), a voting practice "aimed at diluting black votes [is] forbidden by § 5, regardless of its effect."

In addition, the state's argument confuses minority lawyers with minority voters. This is not an action under Title VII of the Civil Rights Act of 1964 brought by lawyers claiming that they have not been selected as judges in sufficient numbers. Instead, this is a voting rights case in which appellants contend that minority voters have been subjected to invidious discrimination.

Moreover, given the fact that the state has discriminated against blacks in education and admission to the bar, it would reward the state for its misconduct to allow it to defend its discriminatory voting practices on the grounds that there were few black lawyers in the state. Such a defense has as much merit as the plea of one convicted of murdering his parents that the court show mercy because she is an orphan. The real crux of this case is the lower court's failure to give *any* consideration to the evidence of purposeful discrimination in the method of electing judges in Georgia.

The state is wrong in claiming that appellants seek "the repeal" of the majority vote requirement or that the state change any of its practices or statutes in effect prior to November 1, 1964. Motion to Affirm, pp. 10, 14. Appellants merely seek a ruling that voting changes enacted after the effective date of Section 5 not be implemented where they are infected with a racially discriminatory

purpose. That is one of the things Section 5 was expressly designed to accomplish. *Beer v. United States*, 425 U.S. 130, 141 (1976); *Johnson v. De Grandy, supra*, 114 S.Ct. at 2661 (purposeful discrimination is forbidden by Section 5).

The state also errs in saying that the disputed changes did "one thing only," *i.e.*, added seats to the superior court. Motion to Affirm, p. 16. To the contrary, the changes also provided for a method of electing the added judgeships.[4] That method of election cannot be shielded from Section 5 review.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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[4] More than 50 of the 60 statutes incorporated by express reference the at-large, majority vote and designated post method of elections. J.S. 10.